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## Florida Constitutional Law

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## PUBLIC LAW

### FLORIDA CONSTITUTIONAL LAW<sup>1</sup>

CLIFFORD C. ALLOWAY\*

#### INTRODUCTION

The following outline illustrates the materials discussed in the 1954, 1956 and 1958 biennial Florida constitutional law articles. Subjects followed by an asterisk (\*) have been transferred, in whole or in part, to other articles in the 1960 Florida Law Survey. Subjects followed by two asterisks (\*\*) have not been discussed, since the decisions involved did not reflect significant changes in Florida constitutional law.

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1. Volumes 96 through 112, Southern Reporter, second series.

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The present article analyzes selected decisions disposing of Florida constitutional issues; Florida court interpretation of United States constitutional phraseology is generally omitted.

Court decisions<sup>2</sup> and legislative reapportionment<sup>3</sup> battles presently form an atmosphere in which comprehensive constitutional reform in Florida

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2. *E.g.*, *Rivera-Cruz v. Gray*, 104 So.2d 501 (Fla. 1958).

3. The problem of fair political representation is still characterized by federal and Florida courts as "political," rather than "judicial" in nature.

appears impossible. Happily, dedicated Florida lawyers and judges maintain their reform efforts.<sup>4</sup>

### EXECUTIVE POWER

*Effect of Governor's Absence from the State* — The Governor requested an opinion of the justices of the Florida Supreme Court on whether his contemplated absence from the state for thirty days would cause a devolution of his powers and duties upon the President of the Senate. Article IV, section 19, reads as follows:

In case of the impeachment of the Governor, his removal from office, death, resignation or inability to discharge his official duties, the powers and duties of the Governor shall devolve upon the President of the Senate for the residue of the term, or until the disability shall cease. . . .

The Justices interpreted "inability" to mean "unable," "lack of ability," or "capacity." Absence from the state for a temporary period of time, therefore, would not trigger the terms of Article IV, section 19. In view of the Governor's statement that his absence involved a trip to Russia as Chairman of the National Governors' Conference and his assurance that he would "be in direct communication" with his staff and "subject to prompt . . . return should the occasion demand," the opinion of the Justices seems very reasonable.<sup>5</sup>

*Time within which to Act upon Legislative Bills* — The Legislature, during its regular biennial session, extended its session a stipulated period of days. Article III, section 28 provides that:

Every bill . . . shall, before becoming a law, be presented to the Governor. . . . If any bill shall not be returned within five days after it shall have been presented to the Governor . . . the same shall be a law. . . . If the Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor within twenty (20) days after the adjournment, shall file such bill with his objections thereto, in the office of the Secretary of State. . . .

The Governor requested the opinion of the Justices as to whether he would have twenty days, after the terminal date of the extended legislative session, within which to act upon bills reaching him during the last five days of the extended session. Article III, section 28, was applied by the Justices to the extended session; therefore, the Governor received an affirmative answer to his question.<sup>6</sup>

*Governor's Power to Call the Legislature into Extraordinary Session to Reapportion* — Article VII, section 3, states that:

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4. The Florida Constitution Committee of the Florida Bar is studying yet another draft; the Committee's next meeting will be held at Stetson Law School this fall.

5. *In re* Advisory Opinion to the Governor, 112 So.2d 843 (Fla. 1959). Cf. *State v. Gray*, 74 So.2d 114 (Fla. 1954).

6. Advisory Opinion to the Governor, 95 So.2d 603 (Fla. 1957).

The Legislature that shall meet in regular session A.D. 1925, and those that shall meet every ten years thereafter, shall apportion the Representation in the Senate . . . and, at the same time . . . also apportion the Representation in the House. . . . Should the Legislature fail to apportion . . . at any regular session of the Legislature at any of the times herein designated, it shall be the duty of the Legislature or Legislatures succeeding such regular session . . . either in special or regular session, to apportion. . . . In the event the Legislature shall fail to reapportion . . . the Governor shall (within thirty days after the adjournment of the regular session), call the Legislature together in extraordinary session to consider the question of reapportionment. . . .

The regular 1955 session failed to see reapportionment materialize and the Governor, under Article VII, section 3, called the Legislature into extraordinary session to reapportion. During that session the Legislature failed to enact a bill reapportioning the Senate. The 1957 regular and extended sessions likewise failed to reapportion representation in the Senate. However, the last session did see creation of a joint-house committee to study constitutional revision, which would include the reapportionment problem.

The Governor's position, outlined in a request for an opinion from the Justices, was that he would convene the Legislature in a special session in the Fall of 1957 if the committee's work indicated that constitutional revision and reapportionment would receive legislative approval. However, if the committee's work seemed fruitless, he considered it his duty to convene the Legislature in an extraordinary session, under Article VII, section 3, to consider reapportionment. Therefore, he requested answers to three questions:

- (1) Could he, subsequent to the thirty day period mentioned in Article VII, section 3, convene the Legislature in an extraordinary reapportionment session?
- (2) If not, could he issue such a call, within the thirty day period, for a session in the Fall?
- (3) If the second question were answered in the affirmative, and he issued such a call, could he retract it before the Legislature convened if the necessity for the call were obviated by action taken in a special session to consider constitutional revision?

The Justices answered each question:

- (1) Article VII, section 3, requires that the Governor utilize his authority to call a reapportionment session *within* thirty days after adjournment of a regular session. This constitutional limitation does not inhibit his authority to call a special session under Article IV, section 8.<sup>7</sup>

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7. "The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall in his proclamation state the purpose for which it is to be convened. . . ."

- (2) Under Article VII, section 3, the Governor must state the convening date of the extraordinary session in the call. The particular date chosen is within the executive discretion; but once fixed in the call, it cannot be changed by the Governor after expiration of the thirty day period following the regular session.
- (3) The Justices authorized the Governor to cancel a call, under Article VII, section 3; this function would also seem to be within executive discretion.<sup>8</sup>

## LEGISLATIVE POWER

### I. GENERALLY

*Legislative Authority to Convene in Special, Extraordinary, or an Extended Session*—In an advisory opinion to the Governor<sup>9</sup> the Justices stated that the Florida Constitution contained “no authorization for an extension of an extended session” and that the Legislature had “no inherent power to convene itself in special or extraordinary session for any purpose.” Article III, section 2, reads as follows:

The regular sixty day biennial session of the legislature may, by a three-fifths vote of . . . both houses, be extended not exceeding a total of thirty days which need not be consecutive. . . . No extended session may last beyond September 1st. . . .

The Justices construed this language to prohibit the Legislature from extending a regular session, unless such action is taken during the regular session. While a recess from time to time within the extended session could be accomplished by joint house action, once the Legislature extends a regular session for a stipulated period, it has exhausted its constitutional authority.

The Justices specifically stated that their opinion should not be construed to limit the legislative “self-starter” provisions of Article III, section 2, or the power of the Governor to call the Legislature, under Article IV, section 8, into extraordinary session.

*Municipal Enactment of Zoning Ordinance Amendment a Legislative Function*—The Florida Supreme Court, in *Schauer v. City of Miami Beach*,<sup>10</sup> classified the adoption by a city council of an amendment to a general zoning ordinance as the exercise of a “legislative” rather than a “quasi-judicial” function. Judicial scrutiny of the financial motivation of an approving councilman was thereby foreclosed. Five affirmative council votes were necessary to amend, including the affirmative vote of Councilman

8. Advisory Opinion to the Governor, 96 So.2d 413 (Fla. 1957). See also, Advisory Opinion to the Governor, 88 So.2d 131 (Fla. 1956).

9. See note 6 *supra*.

10. 112 So.2d 838 (Fla. 1959), *affirming* *City of Miami Beach v. Schauer*, 104 So.2d 129 (Fla. App. 1958); *accord*: *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948).

SJH. Adoption of the amendment would benefit SJH some several hundred thousand dollars by reason of the impact of the zoning change on property owned by him.

The court stated the question to be whether or not a court may investigate the motives of a council in voting on such an amendment to the zoning ordinance. Analogizing to the problem of a parliament — "it is not difficult to picture the havoc that would be wrought in legislative bodies if each member . . . could by . . . the judiciary be declared disqualified to participate in any legislation that affected a class, race, creed, business . . . to which he belonged" — the court limited judicial review to votes involving "fraud or overreaching." The court was influenced by the factors that "at the worst" SJH "had a selfish interest, possibly with others similarly situated" and that "no attempt was made by him to conceal his interest."

## II. DELEGATION OF LEGISLATIVE POWER

*Invalid Delegation of Municipal Legislative Power*—The Third District<sup>11</sup> invalidated a municipal licensing ordinance under which a child day nursery had been denied an occupational license. The ordinance required "Written certification by the Florida State Welfare Board that said school or nursery has been approved by the . . . Board." Since the city had not established "guides or standards" to channel the state board's discretion, the ordinance was unconstitutional. Reference in the ordinance, to the minimum standards established by the state board, apparently would have sufficed. In part, the court justified its conclusion by noting that the judiciary is unable to review administrative action unless channeled by the legislative power.

Perhaps a more difficult case was *Godshalk v. City of Winter Park*.<sup>12</sup> At issue was the following municipal ordinance:

For the purpose of this ordinance, the term "Tile Contractor" is defined to be a person who is generally engaged in the business of planning, laying out . . . the installation of . . . tile. . . . The board shall examine applicants as to their practical knowledge of the installation of tile. . . . Examination shall be in whole, or in part, in writing, and shall be a practical and elementary character, but sufficiently strict to test the qualifications . . . to carry on the trade . . . and to satisfy as to the applicant's ability as such and his familiarity with rules and ordinances governing the installation of tile. . . .

Plaintiff, a tile contractor, had taken and failed the examination of the Winter Park Tile Examining Board.

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11. *State v. Miami*, 107 So.2d 387 (Fla. App. 1958).

12. 95 So.2d 9 (Fla. 1957). Cf. *City of Naples v. State*, 100 So.2d 78 (Fla. App. 1958).

The Florida Supreme Court, with Justices Drew and Thornal dissenting, invalidated the ordinance as "leaving the granting or denial of a license wholly within the uncontrolled discretion of the Board." Mr. Justice Hobson's majority opinion established an interesting dichotomy in the Florida constitutional law restricting legislative delegation of power. An occupational licensing board apparently may be established under abstract standards when the subjects to be tested are "academic in nature" and the board members are "skilled" in the occupation involved, e.g., the State Board of Pharmacy. The court judicially noticed that a tile contractor's work is not based upon "academic" subjects.

Another technique of drafting a valid occupational examination ordinance was suggested by Mr. Justice Hobson. If the examination deals with "a definite and ascertainable set of rules," such as knowledge of city ordinances regulating the occupation's activities, the examining board will be operating under constitutionally definite standards.

*The Referendum Requirement and Courts of Justices of the Peace* — Article V, section 11, states that:

[T]he legislature may, by special act . . . change the boundaries of any such [justice of the peace] district . . . and may establish new or abolish any such district. . . . Provided, however, that any such changes shall be submitted to the people of any county so affected, by referendum. . . .

The Florida Supreme Court construed this constitutional provision to require that the legislature initially decide whether "justice districts" within a county should be abolished, "subject to the approval of such abolition by the electorate in a referendum election." This power to initially decide could not be delegated to the electorate by the legislature.<sup>13</sup>

## SUBSTANTIVE DUE PROCESS — THE POLICE POWER

### I. INTRODUCTION<sup>14</sup>

Substantive due process determines the governmental power to take or regulate life, liberty or property. This constitutional inhibition does not relate to the procedures necessary to take or regulate, but involves the validity of the exercise of governmental power, as such. Traditionally, the Florida Supreme Court categorizes substantive due process as a problem relating to the breadth of the state "police power." Under Florida due process, the "police power" must be related to the "health, safety, morals or general welfare" of Florida citizenry. Generally speaking, this issue in Florida constitutional law is raised procedurally by a writ or cause of action which allows Florida courts to try, in de novo fashion, the factual

13. See *County of Brevard v. Harland*, 102 So.2d 137 (Fla. 1958).

14. State substantive due process remains very much alive; See, e.g., Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U. L. REV. 226 (1959).

basis for the necessity or reasonableness of the legislative police power activity. Florida courts, at least in theory, grant judicial grace to the legislative department by means of a "presumption of validity." This "presumption", however, has had an uneasy career in Florida.<sup>15</sup>

## II. REGULATION OF BUSINESSES AFFECTED WITH A PUBLIC INTEREST<sup>16</sup>

In 1958, the Florida Supreme Court invalidated legislation which prohibited public insurance adjusters from soliciting business.<sup>17</sup> Approximately 90% of the plaintiff adjuster's business was obtained by direct solicitation. When he learned of a loss he would contact the insured and offer his services on a contingent fee basis.

The court stated that in order "to justify the exercise of the police power the Legislature must be supported by some sound basis of necessity to protect the public morals, health, safety or welfare." Then the court appeared to throw a presumption *against* the validity of the statute by stating that "freedom [of contract] is the general rule and restraint is the exception." Legislative regulation of employment contracts must, therefore, "be reasonably justified by the needs of public health, safety or welfare." Failure of the court to find, either in the record or by judicial notice, any "reasonable basis" for the legislative restriction led to the statute's demise under substantive due process.

Mr. Chief Justice Terrell and Justices Roberts and Thomas dissented. Mr. Justice Thomas believed that the presumption of legislative validity was not overcome by the factual record. He recognized that "while one is in sudden unfortunate circumstances he should not be subjected to appeals of those who would represent him in seeking redress for his loss." Apparently, the Justice found a constitutional basis for the legislative regulation in the unequal bargaining position of "a person in distressful circumstances because of the loss of his property by fire." The dissenters' position would seem to be fortified by simple reference to the traditional heavy regulation of the particular subject matter, insurance, accommodated under substantive due process.<sup>18</sup>

## III. SAFETY

The Third District correctly manipulated the presumption of validity in a 1958 "safety" police power case.<sup>19</sup> Parking lot operators were denied

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15. See, e.g., *Alloway, Florida Constitutional Law*, 12 U. MIAMI L. REV. 288, 300-310 (1958).

16. See Hamilton, *Affectionation with Public Interest*, 39 YALE L.J. 1089 (1930).

17. *Larson v. Lesser*, 106 So.2d 188 (Fla. 1958) (federal constitutional law also argued). See *Yellow Cab Co. v. Ingalls*, 104 So.2d 844 (Fla. App. 1958) where the District Court of Appeal for the Second District announced a broad police power over certification of public transportation vehicles.

18. See, e.g., *Feller v. Equitable Life Assur. Soc.*, So.2d 581 (Fla. 1952).

19. *City of Miami v. Girtman*, 104 So.2d 62 (Fla. App. 1958) (hopelessly intertwined in decisional language was a Fourteenth Amendment due process argument); *State v. Blackburn*, 104 So.2d 19 (Fla. 1958) (Florida and Fourteenth Amendment due

ingress or egress, under a city ordinance, on one of the two streets running on either side of their lot. Permission was denied "because of traffic difficulties incident to the nearby fire station."

The court indulged in the familiar test of evaluating the "inconvenience" to the property owner from the exercise of police power and weighing its conclusion against "the public necessity" of "safety to the traveling public." According to the city the presumption of validity, the court held that the facts alleged failed to state a cause of action under substantive due process. Therefore, in such cases, more must be alleged than loss of profits or an inconvenience to the property owner.

#### IV. MORALS

A 1958 decision<sup>20</sup> upheld, against due process arguments, legislation prohibiting the issuance of motel liquor licenses except to the owner or lessee of the motel. Prior to enactment of the legislation, plaintiffs purchased a liquor license from a motel owner. The effect of the law was to disallow renewal of the license except by issuance to the motel owner or lessee.

The Florida Supreme Court, referring to the broad police power<sup>21</sup> traditionally exercised over the liquor industry, stated that the license "merely" involved "a privilege" and upheld the statute.

#### V. POLICE POWER, GENERALLY

*Limitations on Advertising Rates—City of Daytona Beach v. Abdo*<sup>22</sup> raised the constitutional problem which normally involves a zoning regulation that can be sustained by Florida courts as a concern of aesthetics. However, in this decision the First District characterized the function of an ordinance, prohibiting "outside" rate advertising for tourist accommodations, as maintenance of the city's attractiveness, yet *unrelated to zoning*. Nevertheless, the ordinance was upheld.

The opinion is interesting, in view of the Florida Supreme Court's distaste for municipal regulations designed to alleviate financial hardships flowing from unrestricted competitive practices within an industry. By

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process argued) exemplifies the reluctance of the Florida Supreme Court to adhere to its stated presumption of validity. A state statute made it unlawful to display a sign advertising the retail price of gasoline within fifteen feet of the right-of-way of any public street. The court simply rejected the state's argument that "obstruction of public streets" is "a dangerous practice because the driver's attention is diverted" thereby. The decision is difficult to rationalize because the due process concept is undifferentiated from the equal protection concept. Apparently a state prohibition of *all* signs would survive. The court's factual argumentation seemed to be predicated upon judicial notice.

20. *Leafer v. State*, 104 So.2d 350 (Fla. 1958) (impossible to distinguish federal and state due process arguments); likewise, the obligation of contracts argument failed.

21. *E.g.*, *Pickrell v. Schott*, 55 So.2d 716 (Fla. 1951), *cert. denied*, 344 U.S. 815 (1952).

22. 112 So.2d 398 (Fla. App. 1959) (Chief Judge Sturgis dissented). *Cf. International Co. v. City of Miami Beach*, 90 So.2d 906 (Fla. 1956).

relating "price war" signs to a "honky-tonk [municipal] appearance" the district court was able to validate the ordinance by reference to Florida Supreme Court phrasology favorable to zoning restrictions based upon aesthetic considerations.

*Regulation of a Profession: Accountants* — In 1957, legislation designed to establish a regulated profession for "accountants" was held unconstitutional by the Florida Supreme Court.<sup>23</sup> Under a rule of the State Board of Accountancy, authorized by the statute, only certificated individuals could utilize the title of "accountant" in preference to that of "bookkeeper" (one who serves as a part-time employee for one or more employers).

First, the court judicially noticed the needs of small businessmen for ordinary accounting work and the relatively small number of accountants, certificated by the Board and practicing in the State. Weighing "the needs of small businesses" and "the fundamental right of all . . . to enter into contracts of personal employment" against "the right of the state . . . to regulate the practice of accountancy . . ." the court determined that the police power failed under substantive due process standards. Consequently, non-certificated individuals have a constitutional right to call themselves "accountants" rather than "bookkeepers."

Ignoring the court's failure to grant constitutional grace under the presumption of validity, one could criticize this decision on more pragmatic grounds. Why limit the professional monopolies — regulated severely in the public interest — to the classic professions, such as medicine or law? Perhaps a mistake in "bookkeeping" may be as disastrous to the businessman who pays taxes as a pleading error to the businessman who sues. Judicial reliance on the "right to contract" phrase neatly avoids the social problem facing a "trade" which aspires to professionalize its standards and effectuate its code of conduct.<sup>24</sup> Florida due process, it would seem, should be able to accommodate guild efforts unknown at Common Law.

*Differentiation between the Eminent Domain and the General Police Power* — Two important decisions were rendered by the Florida Supreme Court which limited state destruction of private property, without compensation to the owner. In *Cornel v. State Plant Board*,<sup>25</sup> the court considered the constitutionality of the State Plant Board's "pull and treat"

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23. *Florida Accountants Ass'n v. Dandelake*, 98 So.2d 323 (Fla. 1957) (Justices Hobson and Drew dissented); the decision can be read as a thrust at a CPA monopoly effort, invalid under due process. Also mentioned was a denial of equal protection to the uncertified practitioners. Recently a court of appeals of another state took a contrary approach with somewhat similar legislation, *Pitts v. State Board of Examiners of Psychologists*, 160 A.2d 200 (Md. 1960). In *Dandelake v. Florida Accountants Ass'n*, 108 So.2d 46 (Fla. 1959), the Florida Supreme Court vacated its original decree and remanded the cause for further consideration by the lower court, after the appellate court was apprised of legislation (Fla. Laws, Ch. 57-273, 1957) which might have led the trial court to a different decision.

24. The Rules of Professional Conduct (American Institute of Certified Public Accountants 1958) regulating CPA activities would appear to be a sincere attempt to parallel standard bar ethics.

25. 95 So.2d 1 (Fla. 1957) (Fourteenth Amendment due process argued also).

program under section 12 of the Declaration of Rights to the Florida Constitution, which requires that private property shall not be taken "without just compensation."

The legislature declared "a public nuisance" of any "plant or other thing infested" with the "burrowing nematode," or anything "exposed to infestation." An "emergency" condition was recognized by the legislature in the citrus industry because of the "spreading decline" caused by the "burrowing nematode." The Board authorized removal and burning in all infested citrus zones, plus "the first four trees past the last . . . affected tree. . . ."

The plaintiff grove owners complained that the Board's program for their grove would destroy 197 citrus trees of which only 16 were actually infected. If the court classified the legislative program within the orbit of state police power, compensation need not be paid the owners; however, classification under eminent domain would require compensation by the State. The record related conflicting expert testimony as to the state of "emergency" and the efficacy of the "pull and treat" program. The court's opinion did not disagree directly with the legislative fact finding, but did require compensation to be paid the grove owner for destruction of "healthy trees" which, while not infected, had been exposed to infection. Only in extreme emergencies would the court's rationale permit state destruction of private property to protect property of a "neighbor." Eminent domain requirements, therefore, demanded payment; the state's police power, exercised without compensation, failed.

Federal constitutional law, of course, marches the other way.<sup>26</sup> This may be explained by a natural reluctance on the part of the United States Supreme Court to force state legislatures to cease evaluating which of two classes of property must be destroyed to save the other—which, in other words, has more value to the state's economy. For rare will be the state sufficiently wealthy to compensate the owners of one or the other classes.

The second decision also involved the "pull and treat" program of the State Plant Board. In *State Plant Board v. Smith*,<sup>27</sup> the Florida Supreme Court thoughtfully distinguished between state action under the police power and state action sounding in eminent domain. In this connection the court construed the constitutional significance of Article XVI, section 29 and Declaration of Rights, section 12. Article XVI, section 29, prohibits the taking of private property for public use unless full compensation is made to the owner. Declaration of Rights, section 12, states that private property shall not be taken without just compensation. The following principles apparently limit state power:

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26. *Miller v. Schoene*, 276 U.S. 272 (1928) (Fourteenth Amendment due process argued).

27. 110 So.2d 401 (Fla. 1959) (Fourteenth Amendment due process argued also).

- (1) Eminent domain is a "compulsory purchase of the property of a citizen when such property is to be appropriated to a public purpose for use. . . ." State condemnation of property for a highway would seem to meet this definition.
- (2) Article XVI, section 29, only regulates exercise of the eminent domain power.
- (3) State regulation of property (such as zoning requirements) or state destruction of property as a "public nuisance" is an exercise of the state police power.
- (4) Declaration of Rights, section 12, necessitates compensation to the owner of property sought to be destroyed by the state, under its police power (3, above), when the Florida Supreme Court requires that result.

The statutory framework authorizing the Board's "pull and treat" program was classified as an attempted exercise of state police power. The court invalidated this legislation in the following details:

- (1) in so far as the Legislature tried to limit compensation to owners of uninfected trees to \$1000 per acre.
- (2) the legislative determination that no compensation should be made to owners of infected trees, even if the trees were still "commercially profitable."

Declaration of Rights, section 12, with other constitutional phases not relevant here, was stated by the court to require this result. The decision may make it impossible for the legislature to finance the eradication program, but the court did not discuss the economics involved.

### EQUAL PROTECTION

The Florida Constitution's Declaration of Rights, section 1, which reads that "all men are equal before the law. . ." would seem to be our equal protection inhibition. Several judicial invalidations occurred under this phrase during the present Survey years. The Florida Supreme Court's approach to review of legislative classification problems is quite similar to its review of the legislative police power under substantive due process; in both situations the court demands a "reasonable" basis for the legislative judgment. The presumption of legislative validity receives a judicial "lip-service" which somewhat awes one familiar with federal court review practices.<sup>28</sup>

*Standard to Invalidate under Florida Equal Protection* — The legislature must determine the applicability of statutes under a classification which has "some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary. . . ." Further, "all similarly situated . . .

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28. See, e.g., *Gustafson v. City of Ocala*, 53 So.2d 658 (Fla. 1951).

should be included in one class, at least where there are no practical differences that are sufficient to . . . warrant a . . . special classification in the . . . general welfare."<sup>29</sup> Abstractions such as "reasonable," "arbitrary," "practical," and "general welfare" necessitate court evaluation of the facts in the case record or the facts acknowledged by judicial notice. Under these vague standards judicial legislation will necessarily run riot unless the court rigorously adheres to the presumption of validity. Examination of the recent equal protection cases indicates that the legislative judgment is running a poor second to judicial judgment.

*Naturopathy Legislation*<sup>30</sup> — The legislature in 1927 authorized a state board to license naturopaths. A 1957 act abolished the state board and forbade further licensing. In this act an unusual classification was established; presently licensed naturopaths were divided into three classes:

- (1) those who had practiced naturopathy for fifteen years and over.
- (2) those who had practiced between two and fifteen years.
- (3) those who had practiced less than two years.

Under the 1957 act classes (1) and (2) could renew their licenses annually; class (3) could no longer practice naturopathy. The obvious intent of the legislation was to eliminate naturopathy medicine at some future date when everyone in classes (1) and (2) had ceased the practice. Plaintiff was a class (2) naturopath who sued to invalidate this legislation because of the privileges granted therein to class (1); only class (1) naturopaths were authorized to continue prescribing and administering drugs.

The Florida Supreme Court viewed this arrangement as creating "a closed class" within a "closed class," the former being those naturopaths practicing more than two years and the latter being those practicing at least fifteen years. The "unequal" legislative treatment of the two classes was determined not to be "reasonable" since members of both classes "take the same training and pass the same examination." Further, there was no provision for class (2) to be examined to ascertain whether the members were equally qualified with class (1) members.

It would seem obvious that the legislature intended to protect our citizens from the consequences of medical treatment by a branch of medicine legislatively determined unqualified. Likewise, the legislative classification probably was created by the necessity of political maneuvering on the part of the bill's sponsors. Perhaps, as the court inferred, a "grandfather" clause would have been constitutionally proper; perhaps, also, it would have been easier to negotiate through the legislature. But under a "grandfather" arrangement class (2) naturopaths would have continued to

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29. See *Eslin v. Collins*, 108 So.2d 889 (Fla. 1959) (apparently both the Federal and State equal protection statements were construed); petition for rehearing was denied per curiam, with a dissent by Mr. Justice Thormal.

30. *Ibid.*

administer drugs to Florida citizens. Judicial understanding of the legislative process, plus rigid adherence to the presumption of validity would seem particularly efficacious when the legislature acts under the health police power.

*Real Estate Broker's License Requirements*<sup>31</sup> — Again the legislative judgment was frustrated, but perhaps under more reasonable circumstances. Every applicant for a real estate broker's license, in "counties having a population of not less than 260,000 according to the last Federal census," had to demonstrate to the Real Estate Commission that he had "served an apprenticeship as a salesman . . . with a Registered Broker for not less than 12 months." Only Dade County met the statutory conditions. The Florida Supreme Court insisted that such a regulation must have state-wide application "unless some valid basis for classification clearly appears." None was discovered and the statute was invalidated. The rationale of the legislative classification was not discussed in the opinion, but it is probable that the regulation was imposed on Dade County applicants because of a surfeit of real estate brokers therein.

It should be noted, however, that such a rationale, appearing in the record, undoubtedly would have been the basis for an invalidation under substantive due process.<sup>32</sup>

*Sunday Laws* — It would appear that it is impossible, under the Florida Constitution, for the Legislature to enact a valid Sunday Law. Under one constitutional provision or another the Florida Supreme Court, faced with such a law, inevitably responds by an invalidation.<sup>33</sup> Recently on the judicial block were Florida Statutes, sections 855.01 and 855.02:

- (1) Section 855.01 reads as follows: "Whoever follows any pursuit, business or trade on Sunday . . . unless the same be a work of necessity, shall be punished . . . provided, however, that nothing contained in the laws . . . shall . . . prohibit . . . printing . . . any newspaper . . . [nor] shall [this section] apply to theaters in which moving pictures are shown."
- (2) Section 855.02 reads as follows: "Whoever keeps open store . . . on Sunday . . . shall be punished. . . . In cases of emergency or necessity, however, merchants . . . and others may dispose of the comforts and necessities of life . . . without keeping open doors."

The court invalidated, stating that "it is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all." It was not sufficient that the laws

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31. *State v. Florida Real Estate Comm'n*, 99 So. 2d 582 (Fla. 1957) (petition for rehearing had been granted).

32. Cf. *Lippow v. City of Miami Beach*, 68 So.2d 827, 829 (Fla. 1953).

33. *Kelly v. Blackburn*, 95 So.2d 260 (Fla. 1957), was the latest case; see also, e.g., *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). Cf. *Commonwealth v. Cavalierro*, 28 U.S.L. WEEK 2551 (Pa. C.P. April 20, 1960).

operated "equally upon all within a certain class or classes." The Justices were unable to find a "substantial reason" to uphold the legislative classification.<sup>34</sup>

### FREEDOMS OF SPEECH, PRESS, ASSEMBLY AND RELIGION

*Speech*—Florida constitutional law apparently requires procedural due process to be satisfied by private clubs which expel members.<sup>35</sup> The next logical step, however, was not taken when the First District refused to monitor the basis for expulsion of a member from a private club. The member argued that he had been denied his property under substantive due process, and that his freedom of speech was abridged, by the club action. The court carefully distinguished between substantive rights of members of unions or professional organizations and members of private clubs; only rights of the former, under due process and freedom of speech, will be given constitutional protection.<sup>36</sup>

*Press*—An interesting case, involving a conflict between freedom of press and judicial power, arose in Dade County in 1959.<sup>37</sup> Circuit Judge Giblin entered the following order:

[I] enter this order, in the exercise of the court's inherent power, for the purpose of insuring that the proceedings before me . . . shall be conducted in an atmosphere of dignity . . . with due regard for the rights and privileges of the accused.

. . . [N]o photographs . . . shall be taken during the proceedings before me . . . in the courtroom or at any place within thirty (30) feet of any entrance . . . [thereto]; and . . . the accused shall not be photographed in the jail preceding his arraignment, or in his way to or from the court session during which he is to be arraigned, or in the courtroom. The accused has specifically objected to being so photographed. . . . A violation by any photographer . . . who shall have notice of this order . . . shall . . . be deemed . . . as contempt of this court. . . .

The prisoner had been indicted for rape and there had been "extensive local publicity concerning his arrest and past criminal record." In an obvious attempt to test the validity of Judge Giblin's order, one appellant took motion pictures of the prisoner on the 19th floor of the courthouse,

34. Somewhat analogous was *State v. Blackburn*, 104 So.2d 19 (Fla. 1958) (the decision is difficult to understand; it may relate to due process and/or equal protection, under the state and/or federal constitutions). See also *Florida Accountants Ass'n v. Dandelake*, *supra* note 23, at 329, and *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958) (federal and state equal protection clauses argued, along with other constitutional provisions). The present survey article on Florida Property discusses this decision.

35. *Cf. La Gorce Country Club v. Cerami*, 74 So.2d 95, 96 (Fla. 1954).

36. See *State v. Florida Yacht Club*, 106 So.2d 207 (Fla. App. 1958), *cert. denied*, 111 So.2d 40 (Fla. 1959) (procedural due process is stated as a constitutional requirement, also).

37. *Brumfield v. State*, 108 So.2d 33 (Fla. 1958) (Appellants argued the First and Fourteenth Amendments of the Federal Constitution and the Declaration of Rights, section 13 of the Florida Constitution. The court, as usual, failed to distinguish between the two constitutions).

as the prisoner was brought from an elevator which led to the detention area. The other appellant took photographs for television of the prisoner a short distance from the entrance of the courtroom in which the prisoner was to be arraigned. The Judge immediately cited appellants for contempt of court.

Section 13 of the Declaration of Rights to the Florida Constitution<sup>38</sup> was construed by the Florida Supreme Court so that newspaper and television photography were not constitutionally sanctified, at least under the circumstances of the present case. Views on this subject are prolific and conflicting;<sup>39</sup> however, the author believes that the court's conclusion will be an attractive one to anyone familiar with the massive news media coverage typically given in Dade County to such trials.

The court thoughtfully analyzed the constitutional possibilities involved. The "public trial" concept<sup>40</sup> apparently was limited to attendance by the public at the trial. Then, a distinction was drawn between regulating freedom of expression and regulating access to information of matters of public interest. Freedom of press rights were accorded only to the former. Therefore, a trial court may regulate access to persons in custody, but it may not penalize expression.

Having successfully sailed past these constitutional bars, the court constructed a power source to enable trial courts to regulate the "entire process" of a criminal proceeding, to the end that justice be administered to grant the defendant a "fair trial." The trial court was found to have a duty, as a facet of its inherent judicial power, to control the administration of justice in the case before it. In imposing regulations to achieve this end, the trial court's order must be "reasonably required for the orderly administration of justice." Under the facts of the present case, the court determined that Judge Giblin's order was reasonable because publication of more photographs would "serve only to increase the already large volume of publicity concerning the case," to the detriment of a "fair trial for the accused."

Left for future determination were (among others) several problems:

- (1) If a defendant did *not* object to photographs would a prohibitive court order be valid?
- (2) Does a defendant have a personal right to privacy?
- (3) May the court, during the trial, regulate photographic techniques which are not distracting?

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38. "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press."

39. See, e.g., *Fair Trial and Freedom of the Press*, 19 F.R.D. 16 (1955). See also, *Atlanta Newspapers, Inc. v. Grimes*, 28 U.S.L. WEEK 2564 (Ga. Sup. Ct. May 5, 1960) (a Georgia court order, similar to Judge Giblin's, sustained).

40. FLA. CONST. Decl. of Rights, § 11: "accused shall have the right to a speedy and public trial. . . ."

- (4) May news media coverage be regulated which comments upon events occurring during any part of the "entire process" of criminal justice administration?

*Religion* — An executor requested a declaratory decree construing a will containing the following item:

[A devise of a parcel of land to Orange County for use as a public park, provided that] the Church now located in the vicinity shall have the privilege of baptizing persons in the lake and also the young people of the Church are not to be denied the privilege of swimming . . . in the lake.

Section 6 of the Declaration of Rights to the Florida Constitution provides that:

No preference shall be given by law to any church . . . and no money shall ever be taken from the public treasury directly or indirectly in aid of any church. . . .

The Florida Supreme Court declared the issue to be whether the county could accept the land with a perpetual easement to use it and the lake for "baptismal purposes." Section 6 was construed to permit acceptance of the gift under the theory "any improvement to county owned land will be made for the benefit of the people of the county and not for the church."<sup>41</sup>

#### METROPOLITAN GOVERNMENT<sup>42</sup>

In November, 1956, the state electorate adopted an amendment to the Florida Constitution, Article VII, Section 11, which provided "home rule" for Dade County in local affairs. Pursuant to this amendment, Dade County adopted a Metropolitan Charter establishing a county manager form of government and an enlarged county commission which exercises legislative power. The Charter was destined to provoke litigation by persons holding public office prior to "home rule" and by several of Dade County's twenty-six municipalities which were fearful of losing some of their sovereignty to the new type of county government.

In *Dade County v. Kelly*,<sup>43</sup> the county commission by ordinance "transferred to the [newly created] Public Safety Department the duties, functions and powers of the County Police and County Fire Departments and all functions of the sheriff of Dade County *except the service of civil process*." The Sheriff of Dade County challenged the constitutionality of the ordinance. The Florida Supreme Court held that the county com-

41. *Koerner v. Borck*, 100 So.2d 398 (Fla. 1958) (First Amendment argued also). *Accord*, *Fenske v. Coddington*, 57 So.2d 452 (Fla. 1952). *Cf.* *Bradfield v. Roberts*, 175 U.S. 291 (1899) (analogous First Amendment problem).

42. This section was written by Michael C. Slotnick, University of Miami School of Law, 1960.

43. 99 So.2d 856 (Fla. 1957).

missions under the "home rule" amendment must abolish the office of County Sheriff as a condition precedent to the transfer of its functions and that a piecemeal transfer of functions while the office is still in existence "transcends the amendment." The practical effect of this decision was that Kelly, the elected sheriff of Dade County, who under constitutional requirements must serve until his elected term expired, could not be limited in his functions to a mere process server.

In *Chase v. Cowart*,<sup>44</sup> the Florida Supreme Court upheld a Metropolitan Charter provision which abolished the legislation which created the Dade County Budget Commission, since it was a board "whose jurisdiction lies wholly within Dade County." However, the court, in the same decision, held ineffective an act of the Florida Legislature<sup>45</sup> insofar as it attempted to ratify, affirm and validate the Metropolitan Charter. The rationale was that this legislation, although passed as a general act, was, in fact, a special act applicable only to Dade County. With the adoption of the "home rule" amendment and the Metropolitan Charter, the legislature became powerless to enact special legislation for Dade County.

In *Dade County v. Dade County League of Municipalities*,<sup>46</sup> the Florida Supreme Court permitted a municipal autonomy amendment to the Metropolitan Charter to be presented to the Dade County electorate. Mr. Justice Thornal, speaking for the majority, stated:

If the people in [Dade County] desire Home Rule in its broadest and most completely unrestricted sense, it is theirs to adopt so long as they comply with the provisions of the organic law. On the other hand, and subject only to the same limitation, they can have limited Home Rule. Finally, by the same token, if they desire no Home Rule at all, it is for them to decide. . . .

The autonomy amendment was subsequently defeated by the voters of Dade County.

In *Dade County v. Young Democratic Club of Dade County*,<sup>47</sup> the sections of the Metropolitan Charter providing for non-partisan election of county commissioners were upheld.

Perhaps the most significant decision pertaining to Dade County's experiment in local government, during the present Survey years, was *Miami Shores Village v. Cowart*,<sup>48</sup> wherein an ordinance enacted by the county commission establishing uniformity of traffic control and enforcement throughout the entire metropolitan area was validated by the Florida Supreme Court. In reaching this result the court employed the following standard:

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44. 102 So.2d 147 (Fla. 1958).

45. Fla. Laws, Ch. 57-912, 1957.

46. 104 So.2d 512 (Fla. 1958).

47. 104 So.2d 636 (Fla. 1958).

48. 108 So.2d 468 (Fla. 1958).

[W]e construe the . . . Home Rule Amendment as requiring the [Metropolitan] Charter to provide for municipal autonomy as to the purely local functions or powers of the municipalities in Dade County; and as authorizing regulation and control by the Board on a county-wide basis of those municipal functions and services that are susceptible to, and could be most effectively carried on under, a uniform plan of regulation applicable to the county as a whole.

### AMENDING PROCESS

A 1958 decision, *Rivera-Cruz v. Gray*<sup>49</sup> abrogated the most recent effort to revise the Florida Constitution. The Secretary of State was enjoined from placing a comprehensive revision of the Constitution on the ballot in the 1958 general election.

Proposed amendments to the constitution were incorporated in fourteen legislative joint resolutions; these were intended to revise each article of the constitution except one. The amendments contained in the resolutions were stated to be interdependent in that, unless each was approved, all failed. This was characterized as the "Daisy-chain" amending process.

Two provisions of the Florida Constitution were in issue. The first Article XVII, section 2, relates the method for revising the Constitution. Under it the legislature may determine that a revision is desirable and permit the electorate to vote for or against the revision. Assuming a favorable electoral vote, the legislature must provide for a revision convention. The convention is, then, given the power to revise.

The second provision, Article XVII, section 1, provides for legislatively inspired amendments to be submitted to the electorate. Assuming a favorable electoral vote, the amendments become part of the Constitution.

The precise issue in the *Rivera-Cruz* case was whether or not a constitutional revision can be accomplished by the Article XVII, section 1, procedure. The Florida Supreme Court thought not, under the theory that the procedure for amendments in Section 1 and the procedure for revision in section 2 are independent of each other; therefore, the simpler amending procedure of section 1 cannot be utilized to revise the Constitution. Revision of the instrument could not be achieved through "interlocking" amendments. A distinction between amending, which is a "change of parts," and revision, which is "a recasting of the whole constitution," was drawn. This led to invalidation of the proposed revision methodology.

### MISCELLANY

Florida Constitution, Article XIX, authorizes local option in counties, with reference to the sale of intoxicating beverages. Legislation regulating

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<sup>49</sup> 104 So.2d 501 (Fla. 1958) Mr. Chief Justice Terrell and Mr. Justice Thormal concurred specially with opinion). See also *Pope v. Gray*, 104 So.2d 841 (Fla. 1958); *Gray v. Golden*, 89 So.2d 785 (Fla. 1956).

issuance of liquor licenses was construed by the Florida Supreme Court to prohibit the sale of liquor in some cities having a population of less than 1,251 persons, thereby creating dry areas in a "wet" county. The court upheld the legislation under the rationale that Article XIX does not require that liquor be sold in every area of a "wet" county.<sup>50</sup>

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50. *State v. Cochran*, 112 So.2d 1 (Fla. 1959).